Supreme Court of the United States

October Term, 1976
No. 76-610

STEVEN RYAN, *et al.*,
Petitioners,

vs.

AURORA CITY BOARD OF EDUCATION, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, not yet officially reported, is fully presented in the Petition for Certiorari at pp. A-1 - A-14. The unreported opinion of the United States District Court for the Northern District of Ohio is set forth in the Petition for Certiorari at pp. A-15 - A-37.

JURISDICTION

The jurisdictional requisites adequately appear in the Petition for Certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the Constitutional provisions and statutes cited by Petitioners, this case involves Sections 3319.07 and 3319.08 of the Ohio Revised Code, both of which are fully set forth in the Appendix to this Brief.

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

Whether the Court of Appeals for the Sixth Circuit correctly held that a nontenured Ohio public school teacher cannot acquire a constitutionally protected expectancy of reappointment by virtue of a board of education policy, when the subject policy is inconsistent with the State of Ohio's explicit, comprehensive, and exclusive statutory tenure system, and when the policy would not create an enforceable state law right to reappointment.

COUNTERSTATEMENT OF THE CASE

Each of the four Petitioners was a nontenured public school teacher who was employed by the Respondent Aurora Board of Education (hereinafter "Board") on a "limited contract." These contracts specifically provided that they would terminate at the end of the 1972-73 school year unless renewed by the Board.

In April, 1973, the Board sent Petitioners written notice that their contracts would not be renewed for the following school year. Accordingly, Petitioners' employment terminated with the expiration of their 1972-73 contracts. Thereupon, they filed this lawsuit, asserting that they had been denied due process of law because the Board

had not provided them with written reasons for nonrenewal of their contracts.

Petitioners do not claim that the Board had a statutory obligation to give them reasons, nor, at this stage of the case, do they deny that the Board had the power to terminate them without cause. Ohio law specifically gives boards of education the authority to employ teachers, and it provides for two types of employment contracts—"limited" and "continuing" (R.C. §3319.07 and §3319.08). As fully set forth in the Petition for Certiorari, teachers with continuing contracts are in effect tenured: their employment may be terminated only for cause, and the termination is subject to compliance with statutory hearing procedures (R.C. §3319.16). Termination of a limited contract during its term likewise is subject to cause and statutory hearing procedures. However, teachers on limited contracts are in effect nontenured. So long as a board of education gives them notice before April 30 of its intent not to renew their contracts, they can be terminated at the end of the contract without regard to cause and without being given reasons or any explanation. Moreover, a board of education's decision not to renew a limited teaching contract is final and nonappealable.

Notwithstanding this clear, exclusive statutory tenure scheme, Petitioners claim that they had a constitutionally protected expectancy of reemployment because of the following Board policy:

> "(e) Teachers who are not to be reappointed shall be given the reasons and notified in writing by the clerk-treasurer of the school district as confirmed by the board of education on or before April 30. Such written notice to the teacher on non-re-employment shall not be necessary provided that the teacher, after having consulted with the superintendent of the

schools, shall give to the board of education before April 30 a letter asking that he not be reappointed. All teachers not so notified shall be considered reappointed."

This policy was adopted by the Board in 1964 and published as part of a Policy Handbook in 1965. Although the Petition for Certiorari asserts that the policy was "made available" to Petitioners by the Board, in fact it was last distributed to teachers in the 1966-67 school year and was collected from them at the end of that year. In the 1972-73 school year, teachers were given only a collective bargaining agreement between the Board and the Aurora Education Association and another booklet ("The Teachers Handbook"), neither of which contained the subject policy. Moreover, as the trial court noted, the 1965 Policy Handbook contained many policies which were no longer in effect in 1973. Nevertheless, the trial court found that the subject policy had never been formally repealed and was still in effect. Further, although Respondents vigorously disputed these points, the trial court held that the policy required both written reasons and written notice, and that the Board had not substantially complied with the written reasons requirement (Petition at pp. A-20, A-21 and A-30).

However, the trial court correctly concluded that the policy was invalid as inconsistent with state law to the extent that it conditioned the Board's authority not to renew a limited contract on the giving of written reasons. The trial court also noted that the 1965 Policy Handbook did not purport to confer any degree of permanence on nontenured teachers, and it concluded that the statutory tenure system obviated the need to supply a tenure system by implication from Board policies. Accordingly, the trial court concluded that the Petitioners did not have a property interest in reappointment, and the United States Court of Appeals for the Sixth Circuit affirmed.

REASONS FOR DENYING THE WRIT

I. Introduction

Petitioners advance three reasons for this Court to review the decision below: (1) inconsistency with decisions of this Court; (2) inconsistency with decisions of other U. S. Courts of Appeal; and (3) inconsistency with decisions of the Supreme Court of Ohio. All three of Petitioners' arguments assume that the courts below incorrectly determined the underlying state law issue, and no substantial federal question can be reached in this case unless this Court first reviews the state law question. Each of Petitioners' arguments will now be addressed in turn.

II. The Court Below Explicitly Followed and Correctly Applied the Controlling Decisions of This Court

The Court below explicitly followed and correctly applied this Court's decisions in *Bishop v. Wood*, 425 U.S. ....., 97 S. Ct. ....., 48 L. Ed. 2d 684 (June 10, 1976); *Paul, Chief of Police of Louisville v. Davis*, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976); and *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972).

Indeed, this Court's recent decision in *Bishop*, which the Petition fails to mention, is directly on point. The plaintiff in *Bishop*, a police officer who was discharged without a hearing, asserted a property interest in continued employment based on the language of a local ordinance. The court began by stating the general principle that property interests are created by state law:

> "A property interest in employment can, of course, be created by ordinance, or by an implied contract.

> In either case, however, the sufficiency of the claim of entitlement must be decided by reference to state law." 48 L. Ed. 2d at 690.

The court then found that the ordinance did not provide for judicial review of the grounds for discharge, and held that plaintiff had no property interest in his job.

> "In this case, as the District Court construed the ordinance, the City Manager's determination of the adequacy of the grounds for discharge is not subject to judicial review; the employee is merely given certain procedural rights which the District Court found not to have been violated in this case.
>
> * * * * *
>
> "Under that view of the law, petitioner's discharge did not deprive him of a property interest protected by the Fourteenth Amendment." 48 L. Ed. 2d at 691.

In this case, the appellate court, relying specifically on *Bishop*, *Paul* and *Perry*, held that Petitioners' alleged interest in reappointment must be established by state law (Petition at pp. A-7, A-10, A-11). As in *Bishop*, both the appellate court and the trial court held (as Petitioners now concede) that the subject Board policy did not make nonrenewal of Petitioners' contracts subject to cause or judicial review[1] under state law. As in *Bishop*, both courts further found compliance with the procedural aspects of the policy to the extent that those procedures were consistent with and enforceable under state law. Finally, following this Court's analysis in *Bishop* to the letter, the appellate court concluded that the decision not to renew Petitioners' contracts did not deprive them of a property

1. *DeLong v. Board of Education of Southwest School District*, 36 Ohio St. 2d 62, 303 N.E.2d 890 (1973).

interest protected by the Fourteenth Amendment (Petition at pp. A-2, A-3, A-11, A-13, A-14, A-29, A-36, A-37).

Notwithstanding the clear parallel between *Bishop* and the instant case, the Petition for Certiorari attempts to create a conflict between one sentence in the decision below and language in this Court's decision in *Perry v. Sindermann, supra.* To this end, Section I of the Petition misstates the Sixth Circuit's holding on the state law issues (see Section IV, *infra*) and then asserts that the decision is based on the proposition that any kind of statutory tenure system necessarily eliminates the possibility of basing a Constitutionally protected expectancy of employment on the policies of an educational institution.

This was not the holding of the court. The Sixth Circuit's opinion does include the phrase, quoted by Petitioners, that "a non-tenured teacher has no 'expectancy' of continued employment, whatever may be the policies of the institution, where there exists a statutory tenure system." However, this phrase appears in the middle of a passage which reaffirms the court's reliance on *Perry*:

> "A non-tenured teacher may acquire an 'expectancy' of continued employment where the policies and practices of the institution rise to the level of implied tenure. *See, Sindermann,* 408 U.S. at 603; *Patrone v. Howland Board of Education,* 472 F.2d 159, 160 (6th Cir. 1972); *Lukac v. Acocks,* 466 F.2d 577, 578 (6th Cir. 1972). We hold, however, that a non-tenured teacher has no 'expectancy' of continued employment, whatever may be the policies of the institution, where there exists a statutory tenure system. *See Patrone,* 472 F.2d at 160-61; *Lukac,* 466 F.2d at 578; *Orr,* 444 F.2d 132-33. *See also Blair v. Board of Regents,* 496 F.2d 322 (6th Cir. 1974). Since property interests are cre-

ated by state law and not the Constitution, *Roth* at 577, the fact that *the State limits* the guarantee to only tenured teachers, necessarily negatives any property interest.

"This conclusion is supported by the Supreme Court's decision in *Sindermann.*" (Petition at p. A-10, emphasis supplied.)

The manner in which the State of Ohio limits the reemployment rights of teachers in its exclusive statutory tenure system is spelled out in detail earlier in the Sixth Circuit's opinion: "The statute delineates *only three situations recognized by Ohio law* in which a teacher whose limited contract is about to expire can acquire a right to reemployment without action by the Board to offer continued emloyment." (Petition at p. A-4, emphasis supplied).

Thus, the court below held that the policies of an institution do not create an expectancy of reappointment when, as here, such an expectancy would be unenforceable as inconsistent with the provisions of a statutory tenure system which specifically and exclusively limits reemployment rights. Clearly, this ruling is consistent with *Perry*, where this Court said:

"If it is the law of Texas that a teacher in the respondent's position has no contractual or other claim to job tenure, the respondent's claim would be defeated." 408 U.S. at 602 n.7.

Likewise, the decision of the trial court, which is based on both the existence of a statutory tenure system and the nature of the subject Board policy, clearly follows *Perry*. The trial court said:

"As earlier explicated the first paragraph of Ohio Rev. Code §3319.11 fixes the tenure procedures for teachers

in Ohio's public schools. Patently no board of education has the authority or power to enlarge the limits of teacher tenure beyond those limits. Indeed, the Aurora School District policy book, on which plaintiffs rely, frankly and correctly concedes,

'In developing rules and regulations, it cannot adopt standards which enlarge its authority or that of its employees beyond statutory limits.'

"Moreover, it is determined that subsection 4(e), viewed most favorably for the plaintiffs, does not create implied tenure. In contrast with the Faculty Guide in *Perry, supra,* which stated that the administration 'wishes the faculty member to feel that the he has permanent tenure . . .,' the teacher contract policy of the Aurora School Board is devoid of language indicating any degree of permanency. Finally, the fact that Ohio already has an explicit tenure policy obviates the need, which existed in *Perry,* to supply one by implication.

"Thus, while subsection 4(e) provides a procedure for non-renewal of a limited contract, the provision does not and cannot create any expectancy that such contract will, in fact, be renewed. In the absence of such expectancy, plaintiffs have no legitimate claim of entitlement to continued employment and, therefore, no property interest protectable by the Due Process Clause of the Fourteenth Amendment." (Petition at pp. A-36, A-37.)

Manifestly, the decisions of the Sixth Circuit and the trial court in this case are consistent with and required by the rulings of this Court in *Perry, Paul* and *Bishop.*

III. The Decision Below Does Not Conflict With Decisions of Other United States Courts of Appeals

No doubt aware that the "conventional wisdom" is that petitions for certiorari are most often granted when a conflict exists among the Courts of Appeals, Petitioners attempt to create conflicts between this case and a potpourri of other decisions, all of which are distinguishable as to facts and legal theory.

There are two edges to Petitioners' "conflict of circuits" sword. First, at the end of Section I of the Petition for Certiorari, Petitioners allude without explanation to a supposed conflict between the decision below and the manner in which *Perry v. Sindermann, supra,* was applied in *Soni v. Board of Trustees of the University of Tennessee,* 513 F.2d 347 (6th Cir. 1975); *Cardinale v. Washington Technical Institute,* 500 F.2d 791 (D.C. Cir. 1974); and *Johnson v. Fraley,* 470 F.2d 179 (4th Cir. 1972).

All three of these decisions are perfectly consistent with the decisions below in this case. Both *Johnson* and *Cardinale* were in the context of motions to dismiss filed pursuant to Rule 12(b) of the Federal Rules of Civil Procedure. The plaintiffs' allegations as to the validity of the school policies at issue, and as to their detrimental reliance on them, were taken as true. Indeed, the *Johnson* court specifically declined to decide whether the policies cited by plaintiff were consistent with state law; it did note the relevance of the issue, but left its determination for the trial court on remand. 470 F.2d at 182.

Likewise, there is no inconsistency between the Sixth Circuit's decision in this case and its prior decision in *Soni. Soni* was a classic promissory estoppel/implied contract case, with overtones of national origin discrimination.

Although the plaintiff had not been granted tenure, he had been repeatedly assured that he would have been given tenure but for a statute prohibiting tenure for aliens. Further, he had been treated as if he had tenure for several years prior to his dismissal, and he had relied to his substantial detriment on the representations and conduct of school officials. In contrast, in the instant case, the constitutionality of the applicable state statute is not in question. Moreover, the trial court made no finding of reasonable detrimental reliance on the subject Board policy. The trial court specifically stated: "Moreover, their limited contracts having expired, each plaintiff testified that the Board had the right to make the decision on reemployment." Significantly, the Sixth Circuit did not overrule *Soni* in the decision below. Rather it correctly noted that "*Soni* has no application to the present case." (Petition at p. A-11).

In a second, unrelated attempt to create a conflict of circuits, Petitioners try to develop a substantive due process claim in Section II of the Petition for Certiorari. At the outset of this argument, Petitioners misstate Respondents' position (Petition at p. 9). It is *not* undisputed that the Board committed itself to provide written reasons to teachers after announcing its final, nonappealable decision not to renew their contracts. Respondents vigorously disputed this construction of the policy in both the District Court and the Court of Appeals. Further, Respondents asserted that they had substantially complied with any written reasons requirement, and, alternatively, that a regulation conditioning contract nonrenewal on giving reasons would be unenforceable as beyond the authority of the Board of Education to enact.

The courts below did not accept Respondents' first two arguments but approved the third—i.e., they found

that the Board lacked power to condition its statutory power not to renew a teacher's contract on the giving of reasons. Accordingly, the courts further concluded that such an invalid policy could neither form the basis of a property interest nor be enforced on a substantive due process theory.

This conclusion is not inconsistent with any decision of another Court of Appeals. None of the decisions cited by Petitioners considers the enforceability of an *invalid* government regulation or policy. Moreover, to the limited extent that Petitioners' decisions concern the enforceability of government regulations on any theory of law, they involve enforcement of regulations designed to confer a substantial procedural benefit on the employee—normally a procedural benefit which affects the employee's ability to contest a decision affecting a substantive right. Compare *Vitarelli v. Seaton*, 359 U.S. 535 (1959), a federal administrative law decision on which Petitioners rely, with *American Farm Lines Inc. v. Black Ball Freight Service*, 397 U.S. 532 (1970). In contrast, the policy at issue here at most provides for giving an employee the reasons for a non-appealable decision after the decision has become final. The policy does not permit the employee to contest the decision, and, as the trial court noted, the decision is not one which affects a right to life, liberty or property (Petition at p. A-37).

Within this general framework, the remaining decisions cited by Petitioners are readily distinguishable from the decisions below, as follows:

(1) In *Prince v. Bridges*, 537 F.2d 1269 (4th Cir. 1976), the court dismissed the plaintiff's due process claim. While dicta quoted by Petitioners suggests that agency regulations may be enforceable on a due process theory, the court had no occasion to consider the enforceability of an

invalid regulation in any context, much less the question of whether such a regulation would support a due process claim in the absence of a trial court finding of detrimental reliance on it.

(2) *Green v. Howard University*, 412 F.2d 1128 (D.C. Cir. 1969), was not a Fourteenth Amendment case. Rather, it was decided that the plaintiffs had an implied contract/promissory estoppel claim against the defendant, a private university.

(3) The plaintiff in *Sigmon v. Poe*, 528 F.2d 311 (4th Cir. 1975) asserted a right to reinstatement under a state statute which prohibited dismissal of probationary employees for "arbitrary, capricious, discriminatory or for personal or political reasons." Although the plaintiff had argued that defendant's procedural policies were also of consequence, the Fourth Circuit affirmed the trial court's decision denying preliminary injunctive relief without reference to these local practices. The decision was based solely on plaintiff's failure to establish violations of the substantive right conferred by state law.

(4) *Thomas v. Ward*, 529 F.2d 916 (5th Cir. 1975), has nothing whatever to do with a general obligation to comply with procedural regulations. Rather the court found that the plaintiff had a property interest in continued employment because, like the plaintiff in *Perry v. Sindermann, supra*, he had relied on a school handbook which explicitly conferred a right to dismissal only for cause.

(5) In *Mabey v. Reagan*, 537 F.2d 1036 (9th Cir. 1976), the court cited *Vitarelli v. Seaton, supra*, and a controlling state court decision for the proposition that state agencies must follow their own regulations. It then found no violation of applicable regulations, and remanded the

case for consideration of First Amendment issues. The court did not consider the enforceability of invalid regulations nor of regulations which are unrelated to protection of a substantive right.

(6) *Brouillette v. Board of Directors of Merged Area IX*, 519 F.2d 126 (8th Cir. 1975), noted in dicta that, as a matter of *state law*, the defendant would have had to follow its own regulations *if* it had enacted any. The holding of the case was that the plaintiff, a nontenured public school teacher, had no property interest in reemployment. Dismissing plaintiff's claim, the court said:

> "Under Iowa law, a non-tenured teacher is hired on a year to year basis. Unless affirmative action is taken to terminate employment, however, teaching contracts are automatically renewed each year. We have recently held that this procedure creates no expectation of continued reemployment and thus, no property interest requiring constitutional protection." 519 F.2d at 127.

None of these decisions is inconsistent with the decisions of the court below. Most of them involve issues unrelated to those presented by the instant case. One of them, *Brouillette*, directly supports the decision of the court below, and others provide indirect support for it. Quite simply, Petitioners' conflict of circuits argument is a sham constructed from excerpts taken out of context from dicta in various inapposite opinions. It provides no basis for granting certiorari in this case.

IV. The Courts Below Correctly Applied Applicable Principles of State Law

The decision below interprets state law in a manner consistent with decisions of the Supreme Court of Ohio, Ohio trial courts, and its own prior decision in *Orr v. Trinter*, 444 F.2d 132 (6th Cir. 1971), *cert. denied*, 408 U.S. 943 (1972).

This Court has consistently refrained from reversing a Federal trial court's interpretation of state law, unless that construction is untenable. *Bishop v. Wood, supra*, 48 L. Ed. 2d at 684, n.10. Petitioners' argument falls far short of this standard.

At the outset, it is important to understand exactly what the court below held. It did *not* hold, as Petitioners suggest, that "it was beyond the statutory power of the Board to agree to provide Petitioners with reasons for nonrenewal of their contracts." (Petition at p. 6). Rather, the court held that it was beyond the statutory power of the Board to make renewal of limited contracts subject to cause or to obligate itself to reappoint a nontenured teacher who was not given reasons for a decision not to renew his limited contract. Such a policy would be inconsistent with R.C. §3319.11, which contemplates that a board of education's decision not to renew a limited contract becomes effective upon receipt by the teacher of written notice of nonrenewal, whether or not the notice is accompanied by a written statement of reasons.

This holding is not inconsistent with the authority of a board of education to enact reasonable rules and regulations pursuant to R.C. §3319.20. This power is limited by the principle that such rules cannot be inconsistent with statute *or purport to abrogate a duty imposed on the Board by statute.* As the Supreme Court of Ohio stated in the

syllabus[2] of *Dayton Teachers Association v. Dayton Board of Education*, 41 Ohio St. 2d 127, 323 N.E.2d 714 (1975):

> "A board of education is vested with discretionary authority to negotiate and to enter into a collective bargaining agreement with its employees, *so long as* such agreement *does not conflict with or purport to abrogate the duties and responsibilities imposed upon the board of education by law.*" 41 Ohio St.2d at 127 (Syllabus No. 1) (Emphasis supplied.)

It is well established that R.C. §3319.08 and R.C. §3319.11 define the contract rights of Ohio teachers, and impose the power and duty of reemploying teachers solely in board of education. *Justus v. Brown*, 42 Ohio St.2d 53, (1975); *DeLong v. Board of Education of Southwest Local School District, supra.* Moreover, the duty of a board of education to prevent an unqualified teacher from attaining tenure status is as much a part of the statutory tenure system as the rights and benefits conferred on tenured teachers. As the Sixth Circuit said in *Orr*:

> "[W]e emphasize that an essential feature of State teacher tenure laws is to require a teacher to serve a probationary period before attaining the rights of tenure. State statutes prescribe the rights of tenured teachers to written charges, public hearings and judicial review. The determination as to whether the quality of services of a particular teacher entitles him to continued employment beyond the probationary period, thereby qualifying him for tenure status, or whether his contract of employment should not be

2. Ohio follows the "syllabus rule", by which the syllabus of a Supreme Court decision, not the language of the opinion, contains the controlling principles of law. *Beck v. Ohio*, 379 U.S. 89, 93 (1964); *Cassidy v. Glossip*, 12 Ohio St. 2d 17, 231 N.E.2d 64 (1967).

> renewed prior to attainment of tenure status, is the prerogative of the employer, the Board of Education, 444 F.2d at 135."

Although the Supreme Court of Ohio has not considered facts identical to those of the case at bar, an Ohio trial court recently did in *Monica Zifco, et al., Plaintiffs v. Grand Valley Local District Board of Education, et al., Defendants*, Ashtabula County Court of Common Pleas, Case No. 64953 (Judge Pontius, September 27, 1976) (See Appendix to this Brief, p. 21). In that case, the seven plaintiffs asserted a right to renewal of their limited teaching contracts because of the defendants' "Fair Dismissal Policy." The court dismissed plaintiffs' claim. It held:

> "The policy statement shortens the time of notice to April 10 and imposes many other restrictions on the power of the Board not to renew a limited contract. A recital of such restrictions upon the Board's power is not necessary to set forth in this Memorandum Opinion.
>
> "This issue has been before the courts on several occasions. *The cases hold that where the Statutes provide a procedure for dismissal of a tenured teacher or for non-renewal of a teacher's limited contract, the statutory procedure alone prevails; and Boards of Education may not by agreement or otherwise impose upon their own statutory authority greater restrictions or additional conditions beyond those imposed by the Statute.*"

To counter these cases, Petitioners cite cases standing for the general proposition that a board of education has the power to enact reasonable rules and regulations. *State ex rel. Ohio School Athletic Association v. Judges of*

the Court of Common Pleas of Stark County, 173 Ohio St. 239, 181 N.E.2d 281 (1962); *Wheeler v. Board of Education of Cleveland Heights*, 30 Ohio St. App.2d 136, 283 N.E.2d 652 (1972). They cite one case which holds that a valid school regulation may become part of a teacher's contract with a private university, *Rehor v. Case Western Reserve University*, 43 Ohio St. 2d 224, 331 N.E.2d 416 (1975). Finally, they cite three federal trial court decisions by two judges. The quoted language from *Burkett v. Tuslaw Local School District*, C74-116 Y (N.D. Ohio 1974), is dicta. *Scott v. Joseph Badger Local School District Board of Education*, C74-143 Y (N.D. Ohio 1974) was adequately discussed by the courts below. The third decision, *Sekeres v. Stark County Board of Education*, C75-93 A (N.D. Ohio 1975), specifically acknowledged that a board of education could not depart from statutory requirements. (*Burkett, Badger* and *Sekeres* appear in the Petition at pp. A-45, A-51 and A-56, respectively).

These cases do not establish that the trial court's decision in this case is based on a clearly unreasonable construction of state law. To the contrary, the decisions in *Dayton Teachers Association, Justus, DeLong* and *Zifco* unequivocally support the interpretation of state law adopted by the court below. Accordingly, Petitioners' third argument for granting certiorari should be rejected.

CONCLUSION

For reasons set forth herein, Respondents respectfully submit that the writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

OPINION OF THE COURT OF COMMON PLEAS OF ASHTABULA COUNTY, OHIO IN ZIFKO, ET AL. V. GRAND VALLEY LOCAL SCHOOL DISTRICT BOARD OF EDUCATION, ET AL.

Case No. 64953

IN THE COURT OF COMMON PLEAS

THE STATE OF OHIO)
) SS:
ASHTABULA COUNTY)

MONICA ZIFKO, *et al.*,
Plaintiffs,

vs.

GRAND VALLEY LOCAL SCHOOL DISTRICT BOARD OF EDUCATION, *et al.*,
Defendants.

OPINION

R. PONTIUS, J.:

The seven plaintiffs herein are former teachers in the Grand Valley School District. Each held a limited one-year contract for the school year 1975-1976. No one of plaintiffs was tenured. Plaintiffs seek a mandatory injunction restoring to each of them a teaching position for the 1976-1977 school year and both compensatory and punitive damages. The claim of plaintiffs is based on an alleged denial of a constitutional right to contracted pro-

cedural due process of law in violation of the 14th Amendment to the Federal Constitution.

The basis of plaintiffs' claim lies in a so-called "Fair Dismissal Policy" contained in a "Policy Book" which is Plaintiff's Exhibit 2 and which plaintiffs claim was duly adopted by resolution of the Board of Education in February 1971 after negotiations with the Teachers Association or union. The present members of the Board of Education, and defendants herein were not then members of the Board of Education. This Court does not consider that fact to be at all significant.

At the hearing on August 11 it was stated by counsel on both sides that a search of the Board of Education minutes failed to reveal the formal adoption of the policy statement by resolution; and the right was reserved to submit evidence of that fact upon the return of the Clerk of the Board, who was then absent from the area on vacation, at which time the Board minutes would then be available. However, for reasons hereinafter stated, the Court is of the opinion that the issues raised can well be decided without resort to a determination whether or not the so-called policy was adopted by resolution of the Board which is actually reflected in its minutes.

There was oral testimony to the effect that the policy statement was in fact adopted by resolution of the Board some time during the year 1971 and that on two occasions thereafter, prior to the occurrence of the facts which are the basis for this lawsuit, the Board had in fact acted under the provisions of the policy statement with respect to notice, hearing, etc. regarding the non-renewal of limited contracts of two teachers.

The testimony also showed that it was a practice of the Board to deliver copies of the policy statement to new

teachers at the time of the execution of their contract or immediately thereafter, and such was done with the plaintiffs in this case. The Court therefore will treat the policy statement as having actually been adopted by the previous Board of Education and there is no evidence to indicate that the present Board ever took any action to rescind it. In fact, they reaffirmed it. Thus, the policy statement became a part of each teacher's contract.

The real issues in this case are three in number:

1. Whether plaintiffs have performed all that is required of them in order to be entitled to a judicial remedy, whether in equity or in law, for a claimed breach by the Board.

2. Whether the provisions of the policy statement are valid under State law.

3. Whether or not the Board has breached the contract.

As to question number 1, let it be well understood by all concerned that there is no evidence whatsoever of what is known in contract law as an anticipatory breach by the Board with respect to the requirements of the policy statement in regard to the Fair Dismissal Policy. If there were a claimed anticipatory breach it might excuse performance by plaintiffs. There is none, however, and therefore regardless of the other issues involved, in order for plaintiffs to prevail, they must have performed or offered to perform their obligation under the contract before they can claim relief for an alleged breach of the contract by the Board of Education. This point was not argued orally by counsel, nor was it contained in any memorandum submitted to the Court.

R.C. 3319.11 provides in substance that a teacher under a limited contract (as were the plaintiffs here) is deemed

to be re-employed unless the Board gives written notice of its intention not to renew the contract on or before April 30, and that failure to notify constitutes renewal of the contract. Paragraph 6 of the policy statement provides that such notice be given on or before April 10. The terms of the Statute prevail over the terms or provisions of the contract that are in conflict with Statutes on the same point. This is a fundamental legal principle and requires no citation of authorities to confirm it.

Plaintiffs do not claim that their "property right" to a contract of employment has been denied them by a denial on the part of the Board of their right to procedural due process under the Statute, but rather through a denial of procedural due process created by contract. Assuming there is such a theory in the law, nonetheless two basic principles stand out boldly.

1. The provisions of the Statute are a part of the contract, and prevail over provisions of the contract in conflict with it.

2. Plaintiffs must have performed or offered to perform their part of the contract in the absence of an anticipatory breach by the defendants (and none is claimed or shown with respect to the matters of statement of charges, hearing, and opportunity to present evidence, etc.).

Plaintiffs' answers to interrogatories show that notice by the Board of Education of its intent not to renew the contract of each plaintiff was received April 29. This date is outside of the time limit set forth in paragraph 6 of the Fair Dismissal Provisions of the policy statement, but is within the time limit of the Statute. The interrogatories of plaintiffs also show that no demand for a hearing as provided for in the policy statement (six days after notice) was made by plaintiffs until July 7. Thus plaintiffs did not perform the so-called contract on their part. The

Equity Maxim of "He who seeks Equity must do Equity" would bar the claim to the equitable remedy of injunctive relief. See 29 OJ 2d, 144—Equity.

As to question number 2, are the provisions of the policy statement in question here valid and enforceable under the law? This Court holds that they are not.

At the outset it would be well to keep in mind that Boards of Education are creatures of the legislature and have only such powers and authority and duties as are expressly delegated or imposed upon them by Statute and such additional implied powers as may be necessary to carry into effect the express powers and duties imposed upon them by the Statute.

The State has provided a tenure law for teachers and has provided for and defined limited and continuing contracts. The State has also prescribed procedures for terminating each class of teachers' contracts thus defined.

The provisions of the policy statement with respect to the manner in which a teacher holding only a limited contract may be "dismissed" in the sense of his contract not being renewed for another school year are somewhat similar to the procedures the Board must take to dismiss a teacher holding (or entitled to hold) a continuing contract. The Statute (R.C. 3919.11) requires only written notice by April 30 by the Board of Education to the teacher of intent not to renew a limited contract. The policy statement shortens the time of notice to April 10 and imposes many other restrictions on the power of the Board not to renew a limited contract. A recital of such restrictions upon the Board's power is not necessary to set forth in this Memorandum Opinion.

This issue has been before the courts on several occasions. The cases hold that where the Statutes provide a

procedure for dismissal of a tenured teacher or for non-renewal of a teacher's limited contract, the statutory procedure alone prevails; and Boards of Education may not by agreement or otherwise impose upon their own statutory authority greater restrictions or additional conditions beyond those imposed by the Statute. See the following cases, all cited in the brief of defendant Board of Education. Ryan vs Aurora City Board of Education, U.S. Court of Appeals, 6th Circuit, decided August 2, 1976; DeLong vs Board of Education, Southwest School District, 37 OA 2d, 69; also see Patrone vs Board of Education, 67 OO 2d, 371; State, ex rel Bishop-vs-Board of Education, 139 OS 427 (syl. 7).

The case of Scott and Anderson vs Joseph Badger Local School District, Board of Education, U.S. District Court, Northern District of Ohio, decided July 31, 1974, Opinion by Conti, Judge, referred to in, and copy attached to plaintiffs' Trial Memorandum is, in the opinion of this Court, completely overridden by the decision in Ryan, supra, although not mentioned in the Opinion.

Question 3 stated at the outset of this memorandum is answered by foregoing principles.

For the reasons set forth above, this Court holds that plaintiffs are not entitled to the injunctive relief prayed for on either a temporary or permanent basis, and same will be denied.

The case presently will be retained for later determination on the questions at law pertaining to the right of plaintiffs to recover damages as pleaded. Counsel for defendant will prepare and submit a judgment entry in keeping with this Opinion.

IT IS SO ORDERED this 27th day of September, 1976.

ROLAND PONTIUS
Judge

OHIO REVISED CODE

3319.07 Employment of teachers.

The board of education of each city, exempted village, and local school district shall employ the teachers of the public schools of their respective districts. In making appointments teachers in the employ of the board shall be considered before new teachers are chosen in their stead. In city and exempted village districts no teacher or principal shall be employed unless such person is nominated by the superintendent of schools of such district. Such board of education, by a three-fourths vote of its full membership may re-employ any teacher whom the superintendent refuses to appoint. In local school districts, no teacher or principal shall be employed unless nominated by the superintendent of schools of the county school district of which such local school district is a part; by a majority vote of the full membership of such board, the board of education of any local school district may, after considering two nominations for any position made by the county superintendent, re-employ a person not so nominated for such position.

3319.08 Teacher employment and re-employment contracts.

The board of education of each city, exempted village, local and joint vocational school district shall enter into written contracts for the employment and re-employment of all teachers. The board of education of each city, exempted village, local, and joint vocational school district, which authorizes compensation in addition to the base salary stated in the teachers' salary schedule, for the performance of duties by a teacher which are in addition to

the teacher's regular teaching duties, shall enter into a supplemental written contract with each teacher who is to perform additional duties. Such supplemental written contracts shall be limited contracts. Such written contracts and supplemental written contracts shall set forth the teacher's duties and shall specify the salaries and compensation to be paid for regular teaching duties and additional teaching duties, respectively, either or both of which may be increased but not diminished during the term for which the contract is made, except as provided in section 3319.12 of the Revised Code.

If a board of education adopts a motion or resolution to employ a teacher under a limited or continuing contract and the teacher accepts such employment, the failure of such parties to execute a written contract shall not void such employment contract.

Teachers must be paid for all time lost when the schools in which they are employed are closed owing to an epidemic or other public calamity, and for time lost due to illness or otherwise for not less than five days annually as authorized by regulations which each board of education shall adopt.

Contracts for the employment of teachers shall be of two types, limited contracts and continuing contracts. A limited contract for a superintendent is a contract for such term as authorized by section 3319.01 of the Revised Code, and for all other teachers for a term not to exceed five years. A continuing contract is a contract which shall remain in effect until the teacher resigns, elects to retire, or is retired pursuant to section 3307.37 of the Revised Code, or until it is terminated or suspended and shall be granted only to teachers holding professional, permanent, or life certificates. This section applies only to contracts entered into after August 18, 1969.